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No. 07-926

In The Supreme Court of the United States

AUGUSTA N. ROMAN,

Petitioner,

v.

RANDY M. ROMAN, ET AL.,

Respondents.

On Petition For A Writ Of Certiorari To The Court Of Appeals For The First District Of Texas

BRIEF FOR RANDY M. ROMAN IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether prospective parents, by signing a standard contract required by almost all fertility clinics before they begin the *in vitro* fertilization process, can waive whatever constitutional rights to procreate they may have in the event of divorce?

2. Whether the right to procreate of a woman, who has less than a 1% chance of successfully using frozen pre-embryos to create a child and who has other much more likely options for having children, can outweigh the right of a man who does not want to be forced by the government or his ex-wife to have a child against his will?

3. Does the U.S. Constitution even recognize an absolute right to procreate that justifies overruling the decisions of all state courts that have addressed disputes over frozen pre-embryos, not to mention the European Court of Human Rights?

4. Should the *in vitro* fertilization industry be fundamentally changed by ruling unenforceable the almost universally used agreements between clinics and prospective parents concerning disposition of frozen pre-embryos?

PARTIES TO THE PROCEEDING

Petitioner is Augusta N. Roman. Respondents are Randy M. Roman, Vicki Schnell, M.D. and The Center for Reproductive Medicine.

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INTRODUCTION

Increasing infertility rates and the advance of reproductive technologies are affecting the way that we think about parenting and children. In fact, infertility affects about 10 percent of the reproductive population – approximately 6.1 million women.[1] It affects people of all backgrounds and men and women equally. Although age can be a factor, sexually transmitted diseases, exposure to certain chemicals, tobacco usage, alcohol abuse, or excessive weight gain or loss can all be factors for infertility.[2] Since Louise Brown, the world's first "test tube baby," was born in 1978, the field of assisted reproduction has given our society a new way to create their families where these factors exist and affect their ability to have children. Unfortunately, these new medical technologies have developed so quickly that the laws, at both the state and federal level, have been unable to keep on par with their continual development.

In response to these increasing infertility rates, Assisted Reproductive Technologies, or ART, have developed to enable physicians to manipulate eggs

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[1] Centers for Disease Control/National Center for Health Statistics, "Fertility, Family Planning, and Women's Health: New Data From the 1995 National Survey of Family Growth," *Vital and Health Statistics*, Series 23, No. 19, May 1997. Updated statistics at http://www.cdc.gov/nchs/fastats/fertile.htm.

[2] Arons, J., "Future Choices, Assisted Reproductive Technologies and the Law," Center for American Progress, 2007. http://www.americanprogress.org/issues/2007/12/future_choices.html.

and sperm outside of the human body. IVF, or *in vitro* fertilization, is the most utilized medical procedure where eggs and sperm are joined in a petri dish and later transferred to a woman's uterus.

Typically, fertility hormones are used by the woman to stimulate egg production in the ovaries via a series of injections over the course of a three to four week period. Once the eggs are matured, they are then retrieved vaginally by inserting a needle into the ovaries that suctions the eggs out of the body. Sperm is then introduced to the egg naturally or via ICSI, intracytoplasmic sperm injection. Once the egg and sperm are joined, the pre-embryos[3] are then either transferred at day three or five, with the remaining frozen for future use.

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[3] This Brief will use the proper term "pre-embryo" to describe the three frozen fertilized eggs at issue in this case. The Washington State Court of Appeals explained the difference between a pre-embryo and an embryo:

> *Fertilization takes several hours as the twenty-four chromosomes of each gamete (egg and sperm) fuse, yielding a zygote with a unique genome of forty-eight chromosomes. The zygote is then allowed to divide for about three days, until it reaches two to eight-cell stage. These preembryos, consisting of a few undifferentiated cells, are either implanted or cryopreserved for implantation at a later date. It is not until the cell mass proceeds beyond sixteen cells and implants that it can give rise to an embryo.*

Litowitz v. Litowitz, 10 P.3d 1086, 1088, n. 1 (Wash. Ct. App. 2000), *rev'd*, 48 P.3d 261 (Wash. 2002), *cert. denied*, 537 U.S. 1191 (2003).

As IVF is expensive and invasive, patients elect to retrieve as many eggs as possible, which in turn produces additional pre-embryos remaining cryopreserved, or frozen, for future use. This practice of freezing the remaining pre-embryos has led to the storage of hundreds of thousands of pre-embryos in clinics and laboratories throughout the country. It is estimated that there are over 400,000 pre-embryos now in storage across the United States, according to a survey conducted in 2003 by the Society of Assisted Reproductive Technology.[4]

While many of these remaining pre-embryos will be thawed and placed into a woman, many will remain frozen for years to come. The disposition of these hundreds of thousands of pre-embryos usually remains in the hands of the couple who created them; however, others are forgotten and some become the basis for a dispute when these couples divorce. In order to counter the unavailability of some couples or the inability of couples to reach a joint decision as to the fate of these pre-embryos, most IVF programs have couples determine in advance their choices for the disposition of their pre-embryos, whether they are later abandoned, the couple divorces, the couple fails to pay storage fees, or one or both of them die. It is

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[4] Hoffman, D., Zellman, G., Fair, C., Mayer, J., Zeitz, J., Gibbons, W., and Turner, T., "Cryopreserved Embryos in the United States and Their Availability for Research," *Fertility and Sterility* 79 (5): 1063-1069, May 2003. Summarized at http://www.rand.org/pubs/research_briefs/RB9038/index1.html.

only after these preliminary decisions are made that the IVF clinic will proceed with the egg retrieval, fertilization and freezing process. It is clear that the IVF programs intend for these advance directives, much like a health care advance directive, to help facilitate a resolution in the event of a dispute by permitting the couple, not the clinic, to decide the fate of the pre-embryos beforehand. In fact, most clinics and programs see these directives as providing "administrative convenience and efficiency."[5]

While undergoing their fertility treatments, Randy Roman and Augusta Roman encountered these advance directives with their own IVF clinic. They both signed these documents prior to moving forward with the treatment that they had anticipated would give them the child they had wanted. Unfortunately, prior to the first pre-embryo transfer into Augusta Roman's uterus, the couple decided to divorce. The only contested issue was their three remaining pre-embryos.

Neither the text of the U.S. Constitution or any of the prior decisions of this Court address the competing rights and policy considerations involved in this dispute over ownership of three frozen pre-embryos

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[5] Robertson, J., "Prior Agreements for Disposition of Frozen Embryos," John A. Robertson. 51 Ohio St. L.J. 407 (1990).

that are each too small to be seen with the human eye.

For the last five years of litigation between Randy Roman and Augusta Roman, she has asked to use the frozen pre-embryos to try to buck the overwhelming odds (99% against) and try to create children, whereas Randy Roman has sought to avoid becoming a parent against his will by enforcing the contract the parties signed when they started the *in vitro* fertilization process. For the first time in a footnote in her petition to this Court, Augusta suggests that alternatively the frozen pre-embryos should be available for use by others who want children. Petition for Writ, page 7, footnote 2. Donation of the pre-embryos to strangers is not what the parties agreed to when they signed their contract with the fertility clinic, and it would still result in Randy Roman becoming a parent against his will. In fact, the potential psychological harm done to Randy Roman resulting from the birth of a biological offspring that he is not involved in raising, as he describes below, is something that the Court should not take lightly when considering the issues raised by Augusta Roman.

The Texas Court of Appeals agreed with Mr. Roman and enforced the contract signed by the parties with the fertility clinic, stating:

> *We believe that allowing the parties voluntarily to decide the disposition of frozen embryos in advance of cryopreservation, subject to*

> *mutual change of mind, jointly expressed, best serves the existing public policy of this State and the interests of the parties.*

Roman v. Roman, 193 S.W.3d 40, 55 (Tex. Civ. App. 2006).

The ruling of the Texas Court of Appeals is consistent with the rulings of all six state courts which have previously addressed this same issue, along with a recent decision of the European Court of Human Rights. These cases are cited and discussed below, but their decisions are largely glossed over by Augusta in her petition.

If this Court ultimately determines that Augusta has a constitutional right to procreate, the record shows that she had waived that right to use these three frozen pre-embryos created with Randy when she signed the paperwork at the IVF clinic. And, if Augusta's right to bear children survives her voluntary, written waiver in this case, her right must be balanced against Randy's right to not be forced by the government to have a child against his will – a right recognized by the other state courts that have already addressed this issue. In fact, whatever constitutional right Augusta may have should not matter because there is no state action involved to implicate the Bill of Rights. Augusta Roman has many other options to have children, besides these three frozen pre-embryos, which ultimately only have a one percent chance of success.

STATEMENT OF THE CASE

Randy Roman and Augusta Roman, before they began the *in vitro* fertilization process, signed a standard written agreement required by almost all fertility clinics that addressed the freezing of pre-embryos. A pre-embryo is the zygote created by fertilizing the woman's egg with the man's sperm and allowing it to grow to the size of about eight cells before it is implanted into the woman's uterus. Pre-embryos are commonly frozen (cryogenically preserved) in fertility clinics because typically more eggs are fertilized than will be implanted. Freezing pre-embryos allows the woman to avoid repeating the egg extraction procedure in the future in the event the implantation does not work the first time or in case the couple wants more children in the future.

The Romans signed the *Informed Consent for Cryopreservation of Embryos* agreement and then initialed this section on page 4:

> 10. *If we are divorced or either of us files for divorce* ***while any of our frozen embryos are still in the program****, we hereby authorize and direct, jointly and individually, that one of the following actions be taken: The frozen embryo(s) shall be . . .* ***Discarded***

The agreement also provides on page 2:

> *We consent and authorize the embryo(s) to be stored in a frozen state until Dr. Schnell and the IVF Laboratory determine that*

> *appropriate conditions exist for transfer of the embryo(s) to the wife's uterus and* ***both husband and wife agree to the transfer.*** . . . (emphasis added).

A disagreement between the parties on the night before the scheduled implantation resulted in three pre-embryos being frozen. The subsequent divorce between the Romans resulted in this current dispute over the frozen pre-embryos. The trial court awarded the pre-embryos to Augusta as property. The Texas Court of Appeals reversed and enforced the contract signed by the parties with the fertility clinic.

Augusta Roman concedes that the general odds of a woman at her current age (46) having a child using assisted reproduction are less than one percent.[6] However, Augusta grossly overstates the impact of discarding these three frozen pre-embryos on her ability to otherwise have children. At the trial four years ago, her physician, Vicki Schnell, M.D., testified that Augusta had a 20% to 25% chance of successfully having a child with the IVF process had it gone forward as originally planned; Augusta's chances of having a child dropped to less than ten percent after the embryos were frozen. Dr. Schnell described Augusta's options for having a child other than trying to use the frozen pre-embryos as follows:

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[6] Petition for Writ, page 5, footnote 1. Augusta's odds of successfully using the three frozen pre-embryos at issue are probably much less than one percent since Dr. Schnell testified at trial that freezing the pre-embryos cuts the odds in half.

1. Use her own eggs and donor sperm – her chances would be about ten percent of having a child, the same as using the frozen pre-embryos

2. Use donor eggs and donor sperm – her chances would be 60% to 70% of having a child

3. She could adopt.[7]

The record at trial does not establish that Augusta is unable to have children without the use of the frozen pre-embryos, despite her history of three elective abortions and two miscarriages. At the trial, Dr. Schnell testified as follows:

> *Q: Now, let's talk about today. Can Augusta Roman conceive a child, and by that, I mean, bear a child in her uterus through some way other than using the three frozen embryos that are before this Court?*
>
> *A: Yes.*
>
> *Q: And how could she do that?*
>
> *A: She could pursue trying to use her own ovaries and sperm from another source.*[8]

Randy Roman at trial explained why he would prefer that Augusta, if she insisted on having a child

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[7] Reporter's Record (R.R.) Vol. 2, page 39.

[8] R.R., Vol. 2, page 39.

via IVF, should use donor sperm and not the pre-embryos created using his sperm. Mr. Roman testified:

> *Our embryos were created with the intent to be used only during the marriage between Augusta and I. They were not created to be used in such a way that simply limits me to being a sperm donor, likewise they were not created to be used against my wishes.*[9]

Given that the Texas Family Code arguably states that Mr. Roman would not have any parental rights or duties as sperm donor, unless he specifically asked for them,[10] Mr. Roman still objected to the thought of Mrs. Roman bearing his children, saying:

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[9] R.R., Vol. 3, page 47.

[10] Texas Family Code Sec. 160.706 states:

160.706. Effect of Dissolution of Marriage

(a) If a marriage is dissolved before the placement of eggs, sperm, or embryos, the former spouse is not a parent of the resulting child unless the former spouse consented in a record that if assisted reproduction were to occur after a divorce the former spouse would be a parent of the child.

(b) The consent of a former spouse to assisted reproduction may be withdrawn by that individual in a record at any time before the placement of eggs, sperm, or embryos.

Mr. Roman feels he morally must be a father in all senses of that word to any child created using his sperm. Accordingly, Mr. Roman filed his *Consent to Parentage of Embryos After Divorce* on February 20, 2004.

> *. . . if I am the biological father of a child, I could not bear the emotional consequences of being forced out of my child's life by a court order. And if my DNA does bring a child in this world, I would want to be a father in every sense of the word as financial, emotional, spiritual, soccer, little league, everything else in between.*[11]

Augusta Roman asserts to this Court that, "she neither seeks nor expects Randy to assume any parental or financial obligations for children born from these embryos." Petition for Writ, page 7. That argument is seemingly contradicted by Augusta's request to the trial court for actual damages for fraud and $1 million for exemplary damages, claims the trial court rejected. Moreover, Randy is demanding full parental responsibility and rights if any children are ever created using the frozen pre-embryos, so Augusta cannot argue that she should be awarded the pre-embryos because Randy will not be emotionally or financially burdened. If, against all odds, any children were ever created using these pre-embryos, they would be born into a bitter custody battle that is not likely to abate once there are live children to fight over.

The parties agreed to temporary orders pending appeal, which require that the pre-embryos remain frozen until all appeals are finally resolved.

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[11] R.R., Vol. 3, page 48.

REASONS FOR DENYING THE WRIT

This is a state law contractual dispute, not a case involving federal law or constitutional issues. In fact, this case is merely a contractual dispute between two parties, one of whom wants out of the contract she signed (and initialed) that clearly says any frozen pre-embryos shall be discarded in the event of divorce and one who does not want to be a parent against his will.

Augusta Roman's request for writ of certiorari is based purely on emotion and the overstatement of the facts. Furthermore, this case does not involve a pregnancy currently in place, but rather an attempt to become pregnant against overwhelming odds even if the frozen pre-embryos are released to Augusta. Contrary to her assertions to this Court, Augusta has other avenues for having children, including her own biological children, which have a much greater chance of success for pregnancy than trying to thaw then implant the pre-embryos that were frozen almost five years ago. The highest courts of six states and the European Court of Human Rights have addressed this issue, and all seven opinions support the positions advocated by Mr. Roman in this case. If there is a constitutional right at issue in this case, it is the right to decide whether *or not* to beget a child, a right Randy Roman has as well.

1. Certiorari should not be granted because this case does not meet the requirements of Supreme Court Rule 10.

Supreme Court Rule 10 states, "a petition for a writ of certiorari will be granted only for compelling reasons." Rule 10 provides guidelines as to the types of cases this Court will review from a state court of last resort:

> *(b) a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals;*
>
> *(c) a state court . . . has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.*

This dispute simply does not involve any federal question, much less an important federal question. Instead, as stated above, it involves a contract dispute between the parties.

The decision of the Texas Court of Appeals does not address any federal question, nor does it conflict with the rulings of any other state court of last resort. Indeed, the ruling of the Texas Court is consistent with the holdings of the other appellate courts which have addressed this same issue (see discussion below).

2. Even if Augusta is not allowed to use the three frozen pre-embryos to try to conceive children with 99+% odds *against* success, she has other options for having children.

Augusta is wrong, based on the trial court record, to assert that "implantation of these embryos is her only opportunity to bear biologically related children." Petition for Writ, page 6. As noted above in the Statement of Facts, Dr. Schnell testified that Augusta, at the time of the trial, had the same chances of having *biological* children by using her own eggs with donor sperm as compared to using the frozen pre-embryos (ten percent chance in both cases). The trial court record is silent as to Augusta's odds of having a child using the frozen pre-embryos after they have been frozen for five years, except that Dr. Schnell did testify that the length of freezing the pre-embryos is not what reduces the odds. Schnell said the odds are reduced simply because the pre-embryos were frozen to begin with, plus the aging of the would-be mother's body.

Thus, it is not factually correct for Augusta to compare her situation to the criminals who faced sterilization in *Skinner v. State of Oklahoma*, 316 U.S. 535 (1942).

3. All prior appellate decisions concerning custody of frozen pre-embryos agree with Randy Roman's position.

The highest courts of six states and the European Court of Human Rights have each addressed this issue, and all seven opinions support the positions advocated by Mr. Roman in this case:

- *Whitten v. Whitten,* 672 N.W.2d 768 (Iowa 2003). This opinion reviews prior cases and legal journal articles on disputes over frozen embryos and adopted the "contemporaneous mutual consent" approach – meaning nothing happens with the frozen embryos unless both parties agree.

- *Litowitz v. Litowitz*, 48 P.3d 261 (Wash. 2002), *cert. denied*, 537 U.S. 1191 (2003). The Supreme Court of Washington enforced the couple's agreement concerning the embryos, just as Mr. Roman wants done here.

- *J.B. v. M.B.*, 783 A.2d 707 (N.J. 2001). The New Jersey Supreme Court decided it would not force a person to be a parent against her will when the other spouse has other ways of having a child. That is the same position Mr. Roman is taking in this appeal.

- *A.Z. v. B.Z.*, 725 N.E.2d 1051 (Mass. 2000). The highest court of Massachusetts balanced the parents' constitutional rights to procreate, and not to

procreate, and determined that the right to not procreate prevailed. Mr. Roman contends his right to not procreate against his will should triumph here as well since Mrs. Roman has other options for having a child that are more likely to succeed than her use of the three frozen pre-embryos.

- *Kass v. Kass*, 696 N.E.2d 174 (N.Y. 1998). New York's highest appellate court ruled that the parties' written agreement concerning the embryos should be followed.

- *Davis v. Davis*, 842 S.W.2d 588 (Tenn. 1982). The Tennessee Supreme Court said that agreements between the parties should be followed. In the absence of a written agreement, the Court ruled that the constitutional right not to procreate should ordinarily prevail.

- *Evans v. The United Kingdom,* [GC], no. 6339/05, ECHR 2007-XV. The European Court of Human Rights affirmed the decision of a United Kingdom Court to not allow a woman whose ovaries had been removed because of cancer, to implant frozen embryos created prior to her cancer treatment, over the objection of her former boyfriend who had provided his sperm. This Court has previously looked to the European Court of Human Rights for guidance in privacy issues. See, e.g., *Lawrence v. Texas*, 539 U.S. 558, 573 (2003).

4. If there is a constitutional right at issue in this case, it is the right to decide whether *or not* to beget a child, a right Randy Roman has as well.

Augusta argues that it is this Court's previous cases on access to contraceptives that describe Augusta's constitutional right to decide whether to bear a child without interference, citing *Griswold v. Connecticut*, 381 U.S. 479 (1963) and *Eisenstadt v. Baird*, 405 U.S. 438 (1972). However, she ignores the statement of Justice Brennan in *Carey v. Population Services International*, 431 U.S. 678, 685 (1977), which was made after a review of all of the privacy cases up to that point. Brennan wrote for the plurality, "The decision whether or not to beget or bear a child is at the very heart of this cluster of constitutionally protected choices." Augusta's constitutional arguments conveniently omit the "or not beget a child" part of this right of privacy. This right of privacy involves the decision to have children and to not have children, and it is a right Randy Roman surely has as well.

Randy does not argue that his right to not have children provides him with a "veto" over Augusta's decision to become pregnant. He merely wants his constitutional right to not be made a parent against his will to be considered in the decision on whether or not to enforce the contract the parties signed as they started the IVF process. The narrow holding of the Texas Court of Appeals is limited to IVF involving a

signed agreement about what to do in the event of divorce. It is not realistic to argue, as Augusta does, that the Texas ruling could be a slippery slope that could ever be used to force pregnant women to have abortions or stop implantation into artificial wombs.

5. Augusta has waived any constitutional right to procreate using the three frozen pre-embryos because she signed a contract stating the embryos are to be discarded in the event of divorce.

To the extent Augusta has any constitutional right to procreate using the frozen pre-embryos, she has waived that right by signing the contract with the clinic that clearly says any frozen pre-embryos will be discarded in the event of divorce. A person may waive their constitutional rights in the civil context just as they can in criminal court. *Overmyer Co., Inc. v. Frick*, 405 U.S. 174, 185 (1972). One clear example is in the context of a person who certainly has a right to the freedom of expression; however, that person may waive that right contractually by signing a confidentiality agreement with their employer.

6. Ignoring the parties' contract with the fertility clinic would have devastating practical effect on the IVF industry.

Virtually all IVF clinics require their patients to sign written consent agreements similar to the contract signed by the Romans, which is put in place to

determine how any frozen pre-embryos will be treated in the event of a death, divorce, or even abandonment. If these agreements mean nothing and are rendered useless, each case of the thousands of couples that undergo IVF have the potential to be litigated to determine the relative options, desires and rights of the parties. This result will then place doctors and clinics in the position of being embroiled in litigation, just as happened here, while limiting their ability to practice medicine. In fact, Augusta Roman sued Dr. Schnell and her clinic, so that they would be bound by any court order. Dr. Schnell was forced to hire a lawyer and participate in this protracted litigation. If the clinic agreements governing frozen pre-embryos are found to be unenforceable, then clinics will likely simply stop freezing pre-embryos – resulting in women being forced to undergo additional egg extraction procedures in order to achieve pregnancy. In fact, the end result may be far fewer children being born as a result of IVF.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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